In The

Supreme Court of the United States

October Term, 1976

No. 76-285

O/Y FINNLINES, LTD. AND ENSO-GUTZEIT O/Y,
Petitioners,

v.

LAWRENCE BUTLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners O/Y Finnlines, Ltd. and Enso-Gutzeit O/Y respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on June 2, 1976.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts from the transcript in that Court containing the

Judge's statement to the jury on granting the defendant's motion for a direced verdict are reproduced in Appendix B to this petition.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this petition.

JURISDICTION

The order sought to be reviewed is the opinion and judgment of the Court of Appeals dated June 2, 1976. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether a vessel owner in an action brought against it by a longshoreman subsequent to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* can be held liable in negligence in a situation where a vessel's officer merely instructed the longshoreman where to stow certain cargo, which subsequently fell causing the injuries complained of, but did not instruct the longshore gang as to the method or means to be used to move the cargo.

STATUTE INVOLVED

33 U.S.C. § 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action

> shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

A. Proceedings

In June, 1974, a complaint was filed in the United States District Court for the Eastern District of Virginia, Norfolk Division, on behalf of Lawrence Butler seeking recovery against O/Y Finnlines and Enso-Gutzeit, the managers and owners of the M/S FINNSAILOR, for injuries sustained by Butler aboard the vessel on June 10, 1974. Jurisdiction was based upon diversity of citizenship and amount in controversy, 28 U.S.C. § 1332. The Court also had jurisdiction over the cause by virtue of 33 U.S.C. § 905 and 28 U.S.C. § 1331 and/or General Maritime Law, 28 U.S.C. § 1333. The complaint advanced theories of negligence and unseaworthiness; however, prior to trial the unseaworthiness counts were abandoned by the plaintiff. The defendants filed an answer denying liability and the case was tried in the District Court on April 23, 24, 1975.

However, at the close of all the evidence the District Judge directed a verdict in favor of the defendants on the ground that the shipowner, as a matter of law, had breached

no duty owed to the plaintiff. A timely notice of appeal was filed.

The case was argued before the United States Court of Appeals for the Fourth Circuit and submitted on March 2, 1976. On June 2, 1976 the Court below reversed and remanded the case to the District Court with directions to grant the plaintiff a new trial (Appendix A). No petition for rehearing was filed in the Court below.

B. Facts

At all times material the plaintiff was employed as a longshoreman with Tidewater Stevedoring Corp. Tidewater was an independent stevedoring contractor which had been employed by petitioners to load and discharge the M/S FINNSAILOR at the port of Newport News, Virginia. The plaintiff was a hatch boss or gang header and was in charge of a gang of longshoremen who were engaged in stowing certain heavy equipment including a crane counterweight in the lower hold of the vessel's number 2 hatch. Taking the evidence in the light most favorable to the plaintiff, one of the vessel's officers was present in the hatch and advised the plaintiff that he wanted one of the crane counterweights stowed in a space in the stow between two other pieces of equipment; this space was subsequently determined to be 30 inches wide. The counterweight weighed 26,000 pounds and had the following dimensions: 10′ 4″ long x 7′ 10″ high x 1′ 10″ wide. Although the plaintiff asked the officer if he could stow the counterweight flat, the officer reiterated his desire that the counterweight be placed in the previously designated place in the stow. While the plaintiff and his fellow longshoremen were endeavoring to move the weight in an upright position by the use of towmotors (forklifts), the counterweight fell into one of the towmotors causing it to move backwards crushing the plaintiff's leg and causing

the injuries complained of. The plaintiff and his fellow longshoremen selected the means, method and equipment to be used in handling and moving the counterweight. The vessel's officer at most selected the place of stowage.

REASONS FOR GRANTING THE WRIT

This petition brings before the Court an important question involving the interpretation of the negligence remedy established by Congress when it enacted the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereinafter the Act or LHWCA). This is a question of federal law which has not been, but should be, settled by this Court.

In enacting the 1972 Amendments to the LHWCA, Congress eliminated the longshoreman's right to bring an action against the vessel owner based upon a breach of the warranty of seaworthiness and the shipowner's right to seek indemnity from a plaintiff longshoreman's employer based upon a breach of its warranty of workmanlike service or other indemnity theories was eliminated; thus overruling legislatively this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) and *Ryan Stevedoring Co.* v. *Pan Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

The legislative history of the 1972 Amendments to the LHWCA is contained in almost identical House and Senate Committee reports. S. Rep. No. 92-1125, 92 Cong. 2d Sess. (1972); H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 1972 U.S. Code Cong. and Admin. News 4698 (1972). In these committee reports Congress clearly articulates the basis and nature of the new "negligence" remedy which is to be applicable subsequent to the Amendments. The standard contemplated by Congress is a traditional non-maritime common law standard:

> The purpose of the Amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called such as "unseaworthiness," "non-delegable duty" or the like.
>
> * * *
>
> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third-party than is an employee who is injured on land, and on the other hand that *the vessel shall not be liable as a third party unless it is proved to have acted or failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.* (Emphasis added.)

S. Rep. at 10; H.R. Rep. at 4703.

In the present case the evidence was undisputed that the responsibility for determining the manner and method of stowing the cargo rested with the stevedoring company and its employees including the plaintiff. The plaintiff acknowledged that as hatch boss he instructs his men how to move particular pieces of cargo into their appointed places in the stow and he and the stevedore foreman, also a Tidewater employee, determine what equipment is to be used to move the cargo.

The vessel's officer at most selected the place where the counterweight was to be stowed. Moreover, there was no evidence to indicate that the counterweight could not be stowed safely in the place which was allegedly selected by one of the vessel's officers. The counterweight fell at a time when it was being handled under the exclusive control of

the plaintiff and his fellow longshoremen, and there is no evidence in the present record to indicate that any member of the vessel's crew had any control or involvement in the stevedore's performance of the work, i.e., the movement of the counterweight from the square of the hatch to the designated space in the stow.

The legislative history of the 1972 Amendments further indicates that the vessel owner would not be responsible for acts or omissions of the stevedoring company or its employees. The House Report is particularly enlightening in this regard and provides in pertinent part:

> Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act . . . [or] for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work.

H.R. Rep. at 4703.

Aside from the present case there have only been a handful of decisions of the Courts of Appeals dealing with the standard of care to be applied subsequent to the 1972 Amendments: *Bess* v. *Agromar Line,* 518 F.2d 738 (4th Cir. 1975); *Slaughter* v. *S.S. Ronde,* 509 F.2d 973 (5th Cir. 1975); *Napoli* v. *Hellenic Lines, Ltd.,* ..... F.2d ....., No. 75-7476 (2nd Cir. May 25, 1976); *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756 (2nd Cir. 1975), *cert. denied,* 96 S.Ct. 783 (1976). All of these decisions have discussed the legislative history at some length and cited it with approval insofar as it expressed the intent of Congress that traditional land-based concepts of negligence should apply.

The decisions referred to above do not deal specifically with a situation where, as in the present case, a member of the vessel's crew has provided instructions to the longshoremen with regard to where cargo is to be placed but the choice of the method of moving the cargo rests with the

stevedoring personnel. It is submitted that the mere giving of an instruction as to where the cargo was to be stowed under the facts and circumstances of the present case cannot constitute negligence as a matter of law.

The decision of the Court of Appeals misconceives the relationship between premises owners and independent contractors and the legal duties which exist under land-based negligence principles. Retention of general supervisory control as to the results of the work so as to insure satisfactory performance of the independent contract, including the right to make suggestions as to where cargo is to be placed, does not make the shipowner responsible for accidents which arise as a result of the method utilized by the independent contractor in performing the work. E.g., *McDonald* v. *Shell Oil Co.*, 44 Cal. 2d 785, 285 P.2d 902 (1955); *Kull* v. *Mid-America Pipeline Co.*, 476 F.2d 271 (5th Cir. 1973).

In summary the Court of Appeals, insofar as it equated the crew member's direction as to where the cargo was to be stowed with an instruction as to how it was to be stowed, misconceives the duties and relationship between a premises owner and an independent contractor. Moreover, holding that a jury question was presented here is contrary to the congressional intent that the vessel owner should not be responsible for accidents arising by virtue of the means or method chosen by the stevedore to perform its work.

The Court of Appeals also discusses in its opinion whether the District Court erred in refusing to permit the plaintiff's expert, Henry Tiedemann, to testify as to whether it is customary to attempt to stow a counterweight in an upright position. While it is submitted that the District Judge never foreclosed such testimony but merely found plaintiff's proposed hypothetical question to be misleading and not in proper form, even assuming that it was neither customary nor usual to attempt to stow a counterweight upright, this

would not be sufficient evidence to submit the question of the shipowner's negligence to the jury. This is due to the fact that the uncontradicted evidence at trial was to the effect that the counterweight fell while it was being maneuvered by the plaintiff and his fellow longshoremen.

Moreover, the plaintiff was in charge of the longshore gang and given the acknowledged expertise of the stevedore in the area of cargo stowage, it was the plaintiff's obligation, if he felt that the counterweight could not be safely moved in an upright position, to make this known to the vessel's officer and advise him that the counterweight could not be safely handled in an upright position.

The fact that the planitiff and the stevedore failed to follow customary and usual practice cannot be imputed to the shipowner since it is clear from the legislative history that Congress did not intend for the shipowner to be held responsible for the negligence of the stevedore or its employees. S. Rep. at 10-11.

Thus, even if it be assumed that the Court below erred in excluding the testimony of plaintiff's expert, the introduction of such evidence at trial would not have tended to show that the shipowner was negligent and give rise to a jury question with regard to this issue.

In remanding this case to the District Court for a new trial, the Court of Appeals has misconstrued the standard of care to be applied in actions tried subsequent to the 1972 Amendments to the LHWCA, and misstated the evidence introduced at the trial. The legislative history of the 1972 Amendments indicates that contemporary land-based negligence standards are to apply. The Court of Appeals failed to properly apply this land-based negligence standard in the present case and the decision is erroneous. The issues presented in this case involve the construction and interpretation of the 1972 Amendments to the LHWCA, and since

these legislative enactments have not been previously construed by this Court, the Petition for Certiorari should be granted in order to review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Petition for a Writ of Certiorari were mailed postage prepaid to Ralph Rabinowitz, Esquire, Rabinowitz, Rafal & Swartz, Maritime Tower, Norfolk, Virginia 23510, counsel for Lawrence Butler, this 27th day of August, 1976.

.....

JOHN B. KING, JR.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1819

Lawrence Butler,

Appellant,

versus

O/Y Finnlines, Ltd., and Enso-Gutzeit O/Y,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. J. Calvitt Clarke, Jr., District Judge.

Argued March 2, 1976 Decided June 2, 1976

Before Haynsworth, Chief Judge, and Craven and Butzner, Circuit Judges.

Ralph Rainowitz (Frankklin A. Swartz, Rabinowitz, Rafal and Swartz on brief) for Appellant; Charles F. Tucker (John B. King, Jr., Vandeventer, Black, Meredith and Martin on brief) for Appellees.

CRAVEN, Circuit Judge:

Lawrence Butler, a longshoreman, was injured aboard the defendant's vessel SS FINNSAILOR on June 10, 1974. Butler brought suit against the shipowner,[1] alleging that defendant's negligence[2] was responsible for his injuries. The shipowner moved at trial for a directed verdict, which the district court granted. We reverse and remand for trial by jury.

I.

Since this is an appeal from a directed verdict in favor of the defendant, we must view the evidence in the light most favorable to the plaintiff. Butler is entitled to the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn. *Continental Oil Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Mayes* v. *Pioneer Lumber Corp.*, 502 F.2d 106, 108 (4th Cir.), *cert. denied*, 420 U.S. 927 (1975).

On the day of the injury, Butler, a crew foreman with 15 years' experience, was involved in stowing counterweights[3] aboard the SS FINNSAILOR. Butler's stevedore boss had told him that a ship's officer would instruct his crew

[1] This is an action brought under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, as amended.

[2] The 1972 amendments to the LHWCA eliminated the longshoremen's unseaworthiness remedy against shipowners, but left them with a cause of action based on allegedly "land-based" principles of negligence. *See* the legislative history of the 1972 LHWCA amendments at 3 *U.S. Code Cong. & Admin. News* 4698 (1972).

[3] A counterweight is a metal slab placed in the hold of a ship to balance the cargo load and to keep the ship from listing to one side or another. The counterweight which injured Butler was 7′ 10″ tall, 10′ 4″ long, and only 22 inches wide; it weighed 26,500 pounds.

as to how the counterweights should be loaded. The vessel's third mate was in the hatch supervising and directing the cargo operations. Butler's crew stowed the first counterweight lying flat in the hatch, and ample space remained to stow the second counterweight flat as well. Instead, the ship's mate ordered Butler and his crew to stow the second counterweight between the first one lying flat and some previously-stowed crawler tracks, in a space only 30 inches wide. The only way to place the second counterweight in this narrow space was to raise it upright on its 22-inch side and push it into position using forklift trucks.

Butler protested the order to stow the counterweight in an upright position, suggesting that it be stowed flat like the first, and pointing out that there was plenty of room to stow it flat. The third mate, who was inexperienced in cargo handling and who later admitted it would have been safer to stow the second counterweight flat,[4] nevertheless insisted that it be stowed upright. Morris Hicks, a forklift truck operator experienced in handling heavy cargo, attempted to push the upright counterweight into the narrow space. His forward view was blocked by the counterweight and it became jammed, there being only four inches clearance to either side. When the counterweight jammed, two feet of it remained sticking out beyond the crawler tracks. The mate then waved Hicks forward, indicating by his hand gesture that he wanted the counterweight pushed hard against the bulkhead. Butler brought up another forklift to the side of the counterweight in an attempt to pry it loose so that it could be moved tight against the bulkhead as the third mate had directed. As the crew attempted to unjam the

[4] The Chief Officer of the ship, who had assigned the third mate to supervise cargo loading on the day of the accident, admitted at trial that the "better" practice is to stow counterweights flat.

upright counterweight, it fell over, smashing the forklift against Butler's leg, crushing it so badly that amputation was required.

II.

At trial Butler's attorney attempted to introduce the testimony of an expert witness, Henry Tiedemann, a graduate of the Massachusetts Institute of Technology with a degree in marine engineering and a certified marine architect who had had first-hand experience in the handling and stowage of counterweights aboard ship. Had he been permitted, Tiedemann would have testified to the custom of the trade in handling and stowing counterweights. He would have said that the defendant's own cargo plan indicated that counterweights should be stowed flat, not upright. Finally, Tiedemann was prepared to express an opinion as an expert that the attempt to stow a 26,500 pound counterweight upright on its 22-inch base in a narrow 30-inch space was neither customary nor safe. The district court, however, refused to permit Tiedemann to testify as to custom of the trade or to state his opinion as to the danger of stowing a counterweight upright. The district judge stated that since evidence of departure or variance from trade custom can never be of itself *conclusive* as to negligence, it has no probative value at all and should be excluded. It is well established that while conduct inconsistent with customary practice does not necessarily prove negligence, it is relevant to the issue of negligence and the establishment of the proper standard of care. Thus it was error to exclude Tiedemann's offered testimony. *See, e.g., Baker* v. *S/S CRISTOBAL,* 488 F.2d 331 (5th Cir. 1974); *Rich* v. *Ellerman & Bucknall S.S. Co.,* 278 F.2d 704 (2nd Cir. 1960); *Tebbs* v. *Baker-Whiteley Towing Co.,* 271 F.Supp. 529 (D. Md.), *aff'd,* 407 F.2d 1055 (4th Cir. 1969); *Ramirez* v. *Toko Kaiun K.K.,* 385 F.Supp. 644 (N.D. Cal. 1974).

At trial, the ship contended and the district court agreed that the ship's mate was merely instructing the crew where to stow the counterweight, and was not responsible for the manner in which it should be done. Inherent in the mate's choice of *where,* however, was a direction as to *how,* for the mate had chosen a spot so narrow, cramped and confined that he knew that the only way to place the counterweight was to put it in an upright position on its narrow edge.

We believe that plaintiff introduced sufficient evidence, if believed, to justify a jury determination that the defendant was liable in negligence to Butler for damages. Since a jury verdict was forestalled by the action of the trial judge, plaintiff is entitled to a new trial.

Reversed.

APPENDIX B

PROCEEDINGS IN OPEN COURT

[335] * * *

(Thereupon, the jury returned to the jury box at 5:11 p.m.)

The Court: Let the record show that all the members of the jury have returned to the box.

Members of the jury, there comes a time in some law cases where the responsibility for the outcome of the litigation rests with the judge; and as I told you at the beginning of this case, the establishment of any questions of fact were entirely within your province, but where the rulings of the judge on matters of law vests responsibilities in certain parties and there are no facts in dispute about whether or not those responsibilities are met, then it becomes a matter of

law for the Court to take care of, and the Court has received a motion, at the end of the plaintiff's evidence to dismiss this case. That motion was made by the defendant.

The Court at that time very reluctantly—well, the Court overruled it, although the Court felt that it should have been granted, but the Court wanted to make sure that we got every bit of evidence in this case that we could have.

That motion of the defendant was properly renewed at the conclusion of the trial, and after [336] giving the matter further consideration, the Court has felt compelled to grant that motion, that is, the motion to dismiss.

You-all have sat on this case for two days, and I think that you are entitled to know the Court's reasoning, because you have taken part in the case, and I certainly am not willing to just say, "Well, I have taken care of it; thank you, and go home."

The Court has ruled as a matter of law that the responsibility in this case was on the vessel, or the owner of the vessel, to designate where the cargo should be stowed, and you have heard some testimony about the safety of the vessel at sea, and so forth.

The Court feels that that is, as a matter of law, the prerogative of the vessel owners or the vessel's officers to say, "I want this piece here, I want that piece there," and so forth.

It is the responsibility, under the testimony in this case—and there is no contradiction of this—that it is the stevedore company's responsibility to determine what means they wish to use, or it wishes to use, what manpower it wishes to use, and what tools it wishes to use in order to get the freight from the place where it is dropped through the hatch to the place where the vessel says, "This is where we want it [337] stowed," something like, I suppose, if you-all move into a house and the mover comes and brings the furniture,

you, as the owner of the house, would tell the furniture mover, "I want this bed in this bedroom, this icebox and this refrigerator in this kitchen," and so forth.

The Court has determined that there is no evidence that the vessel at any time impinged in any way upon the function of the stevedoring company in moving this counterweight from the point where it came down through the hatch to where it was when it fell over.

You will recall the testimony was that the plaintiff himself was in charge of the crew and that the crew, under his directions, were the ones that put the pieces of wood under it—the slide board under it, got the towmotors behind it, and pushed it over, and that the Tidewater Stevedore crew determined itself that it was only going to use two men and two towmotor operators.

You will recall that when it didn't go in straight and got hooked up at an angle that the plaintiff, as the crew boss himself, determined that he was going to take one motor around from behind and take it up around in front to push the—try and [338] straighten the thing up.

At no time did any member of the ship's crew tell any of the members of the stevedoring crew how to go about moving this piece of equipment, and so the Court finds that there is no evidence that the crew took part at all in the separate function of moving this equipment from the place where it came in the hatch to where the vessel's officers said they wanted it to be. So, obviously, the accident happened as a result of the movement of the freight from one point to another, which was always entirely within the jurisdiction and control of the stevedore company.

Now, in order for the plaintiff to have recovered in this case, he would have to prove that the vessel did something negligent, and where the vessel has taken no part in the act which set up the falling of the counterweight, then, of

course, the vessel cannot be guilty of any negligence, because it had nothing to do with it. All of the movement of that freight was entirely within the hands of the stevedoring company, which company is not a defendant in this case.

The Court is well aware of the seriousness of the injuries of the plaintiff and it has weighed very heavily on the Court's heart to have to tell the [339] plaintiff that as a matter of law he cannot recover in this case, but it is the responsibility that I undertook when I went on the bench to handle the law as I determined it to be, based upon precedent, statutes, and so forth.

So, the Court wants to tell you that I appreciate very much—and I am sure that both counsel do and all the parties do appreciate it very much—your very diligent attention to this case during these two days, and you have been an alert and very cooperative and a very helpful jury.

I am sorry for the delays that have come about and, believe me, I would much rather have the responsibility of this case in your hands than in mine, but I have had the responsibility and I have had to exercise it, so you will not have to consider the case. The Court has dismissed it and will enter judgment for the defendant.

* * *

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Respondent,

BRIEF OF RESPONDENT BUTLER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT BUTLER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Jurisdiction does not obtain as proceedings herein are not yet final, complete, nor dispositive of the controversy between the parties (see pp. 6-7 herein).

QUESTION PRESENTED

Where the Petitioner's Mate improvidently ordered longshoremen, over their protests, to move and stow a 13-ton counterweight on its 22-inch end into a

30-inch space, rather than stowing said counterweight flat, and the Mate further improvidently ordered the jammed counterweight pushed flush to the vessel's bulkhead, and the counterweight thereby fell, causing Respondent injury, was there not sufficient evidence of Petitioner's negligence for jury determination?

COUNTER STATEMENT OF THE CASE

Petitioner incorrectly suggests that the Mate's "instruction" (in fact orders) had no effect on "the method or means to be used to move the cargo" (Petition, pp. 2,7). When the Petitioner's Mate ordered the counterweight into the narrow space, necessarily this order had the following effect on "the method or means to be used to move the cargo": the counterweight could not be let down flat when it came into the hatch; the counterweight had to be moved upright on its narrow edge; pushing the counterweight upright required the fork-lift trucks to push blind from behind it; being pushed blind upright, the counterweight naturally jammed going into the narrow space required by the Mate. When jammed, the Mate also ordered that the counterweight be pushed flush against the bulkhead, two more feet. This Mate's order had the following effect on "the method or means to be used to move the cargo": the counterweight first had to be unjammed; the working capacity of the fork-lifts had been decreased, as only one fork-lift could be then used; a fork-lift could only unjam from one side of the upright counterweight.

Respondent requested trial by jury. There has been no jury decision on the negligence issue, as the Court of Appeals for the Fourth Circuit has now remanded this cause for trial by jury.

ARGUMENT

I. THERE IS NO GOOD REASON TO GRANT REVIEW

Herein, there is no conflict with any decision of this Court or another Circuit Court. There is no important question of federal law to decide.

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 360 (1962) held:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act, 46 U.S.C.A. §688 (Schulz v. Pennsylvania R. Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668; Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 2d 404) and under the Federal Employers' Liability Act, 45 U.S.C.A. §61 et seq. (Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Ellis v. Union Pacific R. Co., 329 U.S. 649, 653, 67 S.Ct. 598, 600, 91 L.Ed. 572; Dice v. Akron, C. & Y.R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398; Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443,

1 L.Ed.2d 493), trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment noted above, are brought into play. Schulz v. Pennsylvania R. Co., supra, 350 U.S. at 524, 76 S.Ct. at 609. As we recently stated in another diversity case, it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.' Byrd v. Blue Ridge Rural Elec. Cooperative, 356 U.S. 525, 538, 539, 78 S.Ct. 893, 901, 2 L.Ed.2d 953. And see Herron v. Southern Pac. Co., 283 U.S. 91, 94-95, 51 S.Ct. 383, 384, 75 L.Ed. 857."

In Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 525, 610 (1956), the Court stated:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and

sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G.R. Co., 1888, 128 U.S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478."

In United N.Y. & N.J. Sandy Hook Pilots Ass'n. v. Halecki, 358 U.S. 613, 618-619 (1959), the Court stated:

"The defendants owed a duty of exercising reasonable care for the safety of the (plaintiff) . . . It was for the trier of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner..."

In Kermarec v. Campagnie, etc., 358 U.S. 625, 632 (1959), the Court held:

"We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests, the duty of exercising reasonable care under the circumstances of each case."

In West v. United States, 361 U.S. 118, 123 (1959), the Court stated:

"Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty

> to exercise reasonable care to furnish a safe place to work."

West, supra, at p. 123 teaches that such shipowner liability is present with the shipowner's ". . .power either to supervise or to control. . ." or giving "orders". Herein, we have the following: the longshoremen could not put the counterweight flat as they desired, but were required to follow the Mate's order to stow the counterweight upright in the narrow space; the Mates acknowledged their duty to supervise, including safety; the Chief Mate was head of the loading operation; the Third Mate in the hatch was the Chief Mate's emissary; the Third Mate was inexperienced; the Chief Mate placed the Third Mate in the hatch, with the indicia of authority, knowing the Third Mate was inexperienced; the Chief Mate preferred that the counterweight be stowed flat; the Third Mate in the hatch acknowledged the risk of moving and stowing such a counterweight upright on its narrow end, but ordered this notwithstanding.

II. THERE IS NO JURISDICTION TO CONSIDER THE PETITION SINCE THE PROCEEDINGS ARE NEITHER FINAL NOR COMPLETE

The Court of Appeals for the Fourth Circuit has remanded this cause for trial by jury. A jury may find for petitioner or respondent. Thus, the question of negligence must be determined in a new trial. This cause is not complete nor final. It is not ripe for Supreme Court review.

In Arnold v. United States, 263 U.S. 427 (1923), the Court of Appeals modified the District Court's judgment, ordering another jury trial as to certain issues. Because the proceedings were not ready for review, this Court dismissed the petition for writ of certiorari for want of jurisdiction stating, 263 U.S. 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Hamberg-American Packet Co., 148 U.S. 262, 264, 37 L.Ed. 443, 444, 13 Sup.Ct. Rep. 590; Collins v. Miller, 252 U.S. 364, 370, 64 L.Ed. 616, 618; 40 Sup. Ct.Rep. 347; Oneida Nav. Corp. v. W.&S. Job & Co., 252 U.S. 521, 522, 64 L.Ed. 697, 40 Sup.Ct.Rep. 357; and cases therein cited."

In finding absence of jurisdiction to consider the appeal, the Court stated in Keystone Manganese & Iron Co. v. Martin, 132 U.S. 91, 93 (1889):

> "The (Circuit Court) decree is not final, because it does not dispose of the entire controversy between the parties."

CONCLUSION

If any action is warranted, it is summary entry of judgment for respondent longshoreman.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Brief of Respondent Butler in Opposition to Petition for a Writ of Certiorari were mailed postage pre-paid to Messrs. Charles F. Tucker and John B. King, Jr., Vandeventer, Black, Meredith & Martin, One Commercial Place, Norfolk, Virginia 23510, counsel for O/Y Finnlines, Ltd. and Enso-Gutzeit O/Y this 27th day of September, 1976.

Ralph Rabinowitz

Ralph Rabinowitz